COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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| Petition of Charter Fiberlink MA-CCO, LLC, for Arbitration of an Amendment to the Interconnection Agreement between Verizon-Massachusetts, Inc., and Charter Fiberlink MA-CCO, LLC, pursuant to Section 252(b) of the Communications Act, as amended | ) | D.T.E. 06-56 |

ARBITRATOR RULING ON MOTION TO COMPEL
RESPONSES TO INFORMATION REQUESTS

## I. INTRODUCTION

On August 22, 2006, Charter Fiberlink MA-CCO, LLC ("Charter") filed with the Department of Telecommunications and Energy ("Department") a Motion to Compel the Production of Information and Documents ("Charter Motion to Compel") from Verizon Massachusetts ("Verizon"). In its Motion to Compel, Charter requested that the Department require Verizon to respond to data and document requests propounded by Charter on August 5, 2006 (Charter Motion to Compel at 1). On August 29, 2006, Verizon filed an opposition to Charter's Motion to Compel ("Verizon Opposition").

On September 6, 2006, the parties executed a protective agreement ("Protective Agreement") pursuant to which each party will disclose confidential or proprietary information to the other party. Under the terms of the Protective Agreement, Verizon submitted a Motion for Protective Order to the Department on September 6, 2006, in which it asserts that certain information should be granted a higher level of protection and should not be disclosed to Charter. In the interests of time, the Arbitrator will rule below on those data requests with respect to the grounds raised by Verizon in its Opposition to Charter's Motion to Compel, and will rule on Verizon's Motion for Protective Order after Charter has been given an opportunity to file an opposition. To the extent that both parties have filed or will be filing additional motions for confidential treatment with the Arbitrator pursuant to G.L. c. 25, § 5D, the Arbitrator will rule on these motions at a later date and will take the appropriate action to protect against the release of any information granted confidential treatment.

## II. STANDARD OF REVIEW

With respect to discovery (i.e., information requests), the Department's regulations provide:

> The purpose for discovery is to facilitate the hearing process by permitting the parties and the Department to gain access to all relevant information in an efficient and timely manner. Discovery is intended to reduce hearing time, narrow the scope of the issues, protect the rights of the parties, and ensure that a complete and accurate record is compiled.

220 C.M.R. § 1.06(6)(c)(1). Arbitrators have discretion in establishing discovery procedures and are guided, but not bound, in this regard by the principles and procedures underlying the Massachusetts Rules of Civil Procedure, Rule 26, et seq. 220 C.M.R. § 1.06(6)(c)(2). Mass. R. Civ. P. 26(b)(1) provides that:

> Parties may obtain discovery regarding any matter, not privileged, relevant to the subject matter involved in the pending action. . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Finally, G.L. c. 30A, § 12(1) provides agencies with the power to require the testimony of witnesses and the production of evidence. G.L. 30A, § 12(3) states, in part, that any party to an adjudicatory proceeding shall be entitled as of right to the issue of subpoenas in the name of the agency conducting the proceeding. The Department's rule, 220 C.M.R. § 1.10(9), embodies the statutory authority to compel the appearance of witnesses and production of documents by subpoena.

## III. POSITIONS OF THE PARTIES

### A. Charter

In its Motion to Compel, Charter asserts that Verizon failed to fully respond to the vast majority of Charter's requests. Charter asks that the Department require Verizon to respond fully to Data Requests 1.1, 1.8, 1.9, 1.10, 1.12, 1.13, 1.14, 1.15, 1.16, 1.17, 1.19, 1.21, 1.22, 1.23, 1.24, 1.25, 1.26, 1.27, 1.28, 1.30, and Document Requests 2, 3, 4, and 5. Charter asserts that the information sought is closely tied to the issues raised in Charter's Petition for Arbitration, and Verizon's responses will enable Charter to assess Verizon's claims, to challenge the contentions of Verizon's witnesses, and to present the most effective evidentiary record (Charter Motion to Compel at 3). Charter asserts that requiring Verizon to respond fully will ultimately assist the Department in making a well-reasoned decision on an ample evidentiary record (id., citing Boston Edison, D.P.U. 97-95, Interlocutory Order at 9-10 (1998)).

Charter states that Data Requests 1.1, 1.8, 1.9, 1.10, 1.12, 1.13, and 1.16 address the question of the conditions and limitations on fiber meet point arrangements that Verizon has

established with other competitive local exchange carriers in Massachusetts (Charter Motion to Compel at 4). Charter asserts that the information is necessary in order for the Department to determine that Verizon's proposed interconnection rates, terms, and conditions are just, reasonable, and non-discriminatory as required by federal law (id., citing 47 U.S.C. § 252(c)(2)(D)). Charter states that in Data Requests 1.15, 1.19, 1.21, 1.22, 1.23, 1.28, 1.30, and Document Request 5, Charter is seeking information concerning Verizon's costs of building and operating a fiber point meet arrangement (Charter Motion to Compel at 12). Charter asserts that this information is directly relevant to the issue of whether Charter should be liable for Verizon's costs of building and operating a fiber meet point arrangement (id. at 12-13). Charter states that Data Requests 1.14, 1.24, 1.25, 1.26, and 1.27, and Document Requests 2, 3, and 4 seek information as to the location and extent of fiber optic facilities deployed by Verizon (id. at 22). Charter contends that the information is relevant to the question of cost responsibility in that it will help determine whether Verizon has already deployed the fiber facilities that could be used in a fiber meet arrangement, and that where spare fiber exists, Verizon will not incur any immediate or direct costs using such fiber in the fiber meet point arrangement with Charter (id.).

B. Verizon

In its Opposition, Verizon asserts that Charter's Motion to Compel should be denied because the information sought has no bearing on the issues before the Department, are beyond the scope of discovery, or would require resource-intensive special studies (Verizon Opposition at 1). Verizon also contends that certain of the information will be provided to Charter upon execution of a non-disclosure agreement and thus Charter's Motion to Compel was premature (see e.g., id. at 6).[1]

Specifically, Verizon asserts that the information sought in Data Request 1.1 does not have any bearing on an issue and does not inform Charter of whether other carriers are required to agree to similar contract terms (Verizon Opposition at 2).[2] Verizon asserts that Data Request 1.16 relating to Verizon's marketing campaigns also has no bearing on the issues to be arbitrated (id. at 6). Verizon asserts that responses to Data Requests 1.8, 1.9, 1.12, and

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[1] The information that Verizon states it will provide to Charter upon execution of the non-disclosure agreement are responses to: Data Requests 1.10, 1.19, and 1.22 (see Verizon Opposition at 4, 6, and 8)

[2] In its response to Data Request 1.1, Verizon also asserted a reply would reveal individual carrier proprietary information. Subsequently, the Department issued a similar information request to Verizon (see DTE-VZ-1-2), and Verizon provided a Motion for Confidential Treatment along with its response in which it asserted that Charter should not be able to obtain the information.

1.13, in addition to having no relevance to the issues, would require Verizon to undertake special studies and would constitute an undue burden (id. at 3 and 4). With respect to Data Requests 1.15 and 1.21 and Document Request 5, Verizon assets that the precise cost of building a fiber meet point is not at issue and has no bearing on the issues to be arbitrated (id. at 7, 11-12). Verizon further asserts that the parties agree on the estimated costs for building a fiber meet point and that narrowing provided estimates to precise figures would prove impossible (id. at 7-8, 11). Verizon also asserts that it does not track the data sought in Data Request 1.15 (id. at 12).

Verizon asserts that Charter's request as to costs of interconnection via leased facilities or collocation arrangements is overly vague (id. at 8-9; see Data Request 1.23). Verizon asserts that Charter concedes the vagueness of its question regarding collocation arrangements in its Motion to Compel (Verizon Opposition at 9, citing Charter Motion to Compel at 17). Verizon also asserts that Charter's attempt to obtain the information "is patently manufactured solely to impose burdensome and useless make-work on Verizon MA and increase Verizon MA's arbitration costs" (Verizon Opposition at 9). With respect to Data Request 1.30, Verizon asserts that information as to Verizon's stranded investment is immaterial to the issues to be arbitrated (id. at 10-11). Verizon further asserts that production of the data would require an extensive special study (id.).

Verizon asserts that Charter's request that it state whether it currently has certain equipment in its possession has no bearing on whether such equipment will be available at the time of any build of a fiber meet point (id. at 13; see Data Request 1.28). Verizon further asserts that whether such equipment is "in stock," it would still be included in any cost of building a Charter fiber meet point. Verizon also asserts that it explained in its answer that it generally orders such equipment on a per-job basis (Verizon Opposition at 13). Verizon contends that Charter is attempting through certain requests to "exploit the discovery process to obtain highly sensitive, commercially valuable data showing where Verizon MA intends to compete with Charter in its core video business" (id. at 14; see Data Requests 1.14, 1.17, 1.24, 1.25, 1.26, and 1.27 and Document Requests 2, 3, and 4).

## IV. ANALYSIS AND FINDINGS

As an initial matter, the Department's Ground Rules for this arbitration require the parties to attempt to resolve discovery disputes prior to filing a motion to compel responses to information requests. The Ground Rules state: "Parties must first attempt resolution of any discovery dispute before coming to the Arbitrator for assistance." D.T.E. 06-56, Memorandum, at 7 (July 5, 2006). In its Motion to Compel, Charter states that it has attempted to resolve the dispute with Verizon, but has been unable to do so (Charter Motion to Compel at 2). However, Verizon contends that Charter did not attempt to discuss discovery issues with Verizon and instead left a voicemail message and sent an email to one of Verizon's attorneys on the day that Charter filed its Motion to Compel (Verizon Opposition at 1 n.1).

Verizon further asserts that its attorney was out of the office and did not receive the message until after Charter's Motion to Compel had been filed (id.).

In an expedited schedule such as this, it is imperative that parties comply with Department requirements designed to streamline the process. However, given our procedural schedule, denying Charter's Motion without prejudice on the basis of failure to comply with the discovery dispute requirement, and allowing Charter to re-file its Motion following discussions with Verizon (if the discussions did not resolve the dispute) prior to the hearing is no longer an option because there is simply not sufficient time remaining in the schedule. Therefore, I waive the requirement that the parties attempt to resolve discovery disputes in this instance and will address the merits of Charter's Motion to Compel. However, I remind the parties that discovery is supposed to proceed without constant Department intervention. Future motions in this proceeding relating to discovery disputes will not be favorably received if they lack a showing that the moving party made a good faith effort to resolve the dispute before filing its motion.

Verizon has stated that it will provide responses to Data Requests 1.10, 1.19, and 1.22 to Charter upon execution of the non-disclosure agreement, which was completed by the parties on September 6, 2006; hence, I conclude that the related portions of Charter's Motion to Compel are now moot and need not be addressed in this ruling.

In considering the appropriateness of the remaining portions of Charter's Motion to Compel, the Arbitrator determines that the majority of the information sought is relevant to this proceeding. Verizon asserts that Data Requests 1.8, 1.9, 1.12, 1.13, 1.15, 1.16, 1.17, 1.19, 1.21, 1.22, 1.24, 1.25, 1.26, 1.27, 1.28, 1.30, and Document Requests 2, 3, and 5 are not relevant to any issues raised in the Arbitration. Under the Massachusetts Rules of Civil Procedure, the standard for determining relevant discovery is extremely broad.[3] I find that the requests either concern admissible evidence or are reasonably calculated to lead to the discovery of admissible evidence. However, Verizon has also raised other objections related to the production of such information, and each of these objections is addressed in turn below.

In its responses to certain data requests, Verizon asserts that information sought that relates to its conduct of business in other states is beyond the Department's jurisdiction (see Data Requests 1.8, 1.9, 1.12, 1.13, 1.15, 1.28, and 1.30). Verizon further asserts that certain of the information sought involves entities other than Verizon New England, Inc. (d/b/a Verizon Massachusetts), and that those entities are not parties to the instant proceeding (see Data Requests 1.12, 1.13, 1.15, 1.28, and 1.30). Verizon offered no legal analysis to support

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[3] Under Mass. R. Civ. P. 26(b)(1), the information sought must be "reasonably calculated to lead to the discovery of admissible evidence."

a contention that the Department and Charter are not entitled to obtain relevant, non-proprietary information regarding Verizon's activities in other jurisdictions.

With respect to Data Request 1.1, Verizon has partially responded to the Data Request in its response to the Department's Information Request DTE-VZ-1-2 by providing the names of other carriers in Massachusetts that have established fiber meet point arrangements with Verizon. However, Verizon did not provide the street addresses in response to DTE-VZ-1-2 because the Department did not ask for such information. As stated above, Verizon has submitted a separate motion outlining the highly classified nature of certain information, and specifically objects to releasing such information to Charter based on the confidential, proprietary, and commercially valuable nature of the information. As stated above, the Arbitrator will rule on the appropriateness of releasing such information to Charter in a separate ruling. As to the second part of Data Request 1.1, Verizon asserts that the information is irrelevant to the issues before the Arbitrator. Charter, however, asserts that the information is necessary to determine whether the terms offered by Verizon are in keeping with its nondiscrimination obligation. The Arbitrator agrees that the street addresses of the fiber meet point arrangements are relevant to determine whether Verizon is meeting its nondiscrimination obligation. Therefore, Charter's Motion to Compel is granted with respect to Data Request 1.1(b). However, until the ruling as to Verizon's Motion for Protective Order is issued, the Department will maintain such information as confidential.

With respect to Verizon's assertions that it does not track certain of the information sought by Charter and that production of such information would require an extensive special study (see Data Requests 1.8, 1.9, 1.12, 1.13, 1.14, 1.15, 1.24, 1.25, 1.26, 1.28, and 1.30, and Document Request 4), the Department evaluates a burdensome claim in the context of the case, including the procedural schedule and the importance of the information sought to the issues being litigated. See e.g., Verizon UNE Rates, D.T.E. 01-20, Interlocutory Order, at 22 (Aug. 31, 2001). Parties face a heavy burden to establish that relevant information should be blocked from discovery. Id. The Department has stated that the objecting party must make a sufficient showing of undue burden, providing details on such matters as to the availability and location of materials and personnel needed to research and develop a response. Id. Merely because compliance would be costly or time consuming is not ordinarily a sufficient reason to avoid discovery where the requested information is relevant and necessary to discovery of evidence. Id. The Department may protect parties against the undue burden of responding to discovery requests that seek irrelevant or marginally relevant information. Id. Thus, the Department may determine that a request is burdensome if the level of detail sought would not further the analysis of the issues or if the impact of the response on the case is expected to be minimal. Id.

The Arbitrator determines that the information sought in Data Requests 1.8 and 1.9 is directly relevant to issues at hand. Specifically, Data Requests 1.8 and 1.9 relate directly to Issue 1 as stipulated to by the parties: "Should the Amendment include language that

conditions Charter's right to request a fiber meet arrangement on the existence of a requisite level of traffic exchanged between the Parties, or other similar conditions?" First Stipulation of Issues, at 2 (Aug. 4, 2006). Without access to such information, Charter is unable to fully evaluate and contest Verizon's assertions that there must be a requisite level of traffic exchanged prior to implementation of a fiber meet point. In balancing the burden with the probative value of the data being sought, the Arbitrator modifies Data Requests 1.8 and 1.9 as follows: Verizon should state whether it has in the past undertaken fiber meet point arrangements before such time that a DS3's worth of traffic was being exchanged.

The information sought in Data Requests 1.12 and 1.13 is also directly relevant to Issue 1 as stipulated to by the parties. However, in order to minimize the burden on Verizon, the Arbitrator modifies the requests as follows: Verizon must attempt to respond by providing information as to whether any of Verizon's OC3 fiber optic systems deployed in Massachusetts or in any other state currently carry, or at any time have carried, traffic volumes below 70% of a DS3 level. If Verizon does not know the response to this question, it must so state.

Charter asserts that certain information related to the location and extent of fiber optic facilities deployed by Verizon is relevant to Issues 2 and 3 (Charter Motion to Compel at 22; see Data Requests 1.14, 1.17, 1.24, 1.25, 1.26, and 1.27; Document Requests 2, 3, and 4). Specifically, Charter asserts that the information relates to cost responsibility and the parties' obligations related to deployment of fiber (Charter Motion to Compel at 22). Verizon asserts that Charter is seeking to "exploit the discovery process to obtain highly sensitive and commercially valuable data showing where Verizon MA intends to compete with Charter in its core video business" (Verizon Opposition at 14). The Arbitrator finds that the information is directly relevant to the issues raised by the parties in the proceeding. For example, in support of Verizon's assertion that it should be required to lay no more than 500 feet of fiber, evidence of the extent that Verizon has already deployed fiber in LATA's 126 and 128 (i.e., where Charter intends to seek a fiber meet point arrangement) is directly relevant. To the extent that the production of any of the information would require a special study, the Arbitrator finds that any burden borne by Verizon is outweighed by the usefulness of the information in potentially compiling a full and complete record. The Arbitrator further notes that Verizon sought to solicit the same information from Charter, and Charter agreed to provide the information upon execution of a non-disclosure agreement (see VZ-Charter-DR-1-2[4], VZ-Charter-DR-1-3, VZ-Charter-DR-1-4). As such, Verizon's assertions that the information is not relevant to the proceeding or burdensome are unpersuasive. Therefore, Charter's Motion to Compel related to Data Requests 1.14, 1.17, 1.24, 1.25, 1.26, and 1.27, and Document Requests 2, 3, and 4 is granted.

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[4] The use of DR denotes document production requests issued by Verizon to Charter.

In Data Request 1.23, Charter sought to determine Verizon's costs of interconnecting with Charter via leased facilities and a collocation arrangement. Verizon asserts that the information request is overly vague and ambiguous. The Arbitrator determines that without more specific details from Charter, it would be difficult for Verizon to provide a comprehensive response. However, as Verizon notes, Charter provided more detailed information in its Motion to Compel. Hence, the Arbitrator grants Charter's Motion to Compel with respect to Data Request 1.23 only to the extent that Verizon is required to state its costs of interconnecting via leased facilities arrangements with Charter.

Charter asserts that the information sought in Data Request 1.30 is directly relevant to the second issue being arbitrated, i.e., whether each party be responsible for the cost of all facilities and necessary arrangements on its respective side of the fiber meet arrangement (Charter Motion to Compel at 17). Verizon contends that the amount of stranded investment it currently has in Massachusetts is irrelevant to the proceeding at hand in that the Department should support efforts to avoid additional stranded underutilized investment (Verizon Opposition at 10). Verizon further asserts that it would require an extensive special study (id. at 10-11). While the Arbitrator agrees with Verizon that the avoidance of additional stranded investments should be supported, information as to Verizon's current stranded investments within Massachusetts is directly relevant to Verizon's pre-filed testimony (see Willett Richter Testimony (Aug. 2, 2006)). Verizon is asserting that the fiber meet point with Charter may constitute stranded investment for Verizon in Massachusetts, and as such, it is appropriate to demonstrate whether any current stranded investment is the result of similar fiber meet points. However, in order to minimize the burden on Verizon while accommodating Charter's need for the information, the Arbitrator modifies the request as follows: Verizon should identify its stranded investment in Massachusetts only as it pertains to fiber meet point arrangements and/or OC3 fiber optic facilities.

While the information sought in Data Request 1.15 is relevant to the question of Verizon's costs of establishing a fiber meet point arrangement, the Arbitrator finds that the probative value of the information sought is outweighed by the burden on Verizon to produce such information. However, Verizon should respond in general terms as to whether it redeploys such equipment and the frequency of such redeployment.

With respect to Data Request 1.16, Verizon asserts that its marketing campaigns have no bearing on any issue in this proceeding. However, Verizon sought the same information from Charter, and Charter responded[5] (see VZ-Charter-1-26). Hence, Verizon clearly understands the relevance of marketing to the issues at hand. Therefore, Charter's Motion to Compel is granted with respect to Data Request 1.16.

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[5] Charter noted that it would provide further proprietary information upon execution of the non-disclosure agreement by the parties (VZ-Charter-1-26).

Charter contends that Data Request 1.21 and Document Request 5 relate to the costs of implementation of a fiber meet point. Verizon asserts that the information sought is not relevant to the issues at hand and would impose an undue burden on Verizon. However, Verizon sought to obtain the same information from Charter (see VZ-Charter-1-27, VZ-Charter-1-28, 1-VZ-Charter-DR-1-5). Hence, Verizon's assertions are unpersuasive. Hence, Charter's Motion to Compel related to Data Request 1.21 and Document Request 5 is granted.

While the information sought in Data Request 1.28 is relevant to the question of Verizon's costs in establishing a fiber meet point arrangement, Verizon asserts that a response would require a burdensome special study. In order to minimize the burden on Verizon, the Arbitrator modifies the question as follows: Verizon should state whether it has the specified equipment in any Massachusetts staging warehouse.

The Arbitrator expects Verizon to provide complete and detailed responses no later than 12:00 p.m. on Monday, September 11, 2006. If the Arbitrator determines that the responses are not complete and detailed, the Arbitrator may take actions consistent with the gravity of Verizon's noncompliance.

## V. RULING

Accordingly, after due consideration, Charter's Motion to Compel is granted in part and modified in part. Given the expedited nature of this proceeding, Verizon should provide its responses to the Data and Document Requests no later than 12:00 p.m. on Monday, September 11, 2006.

Under the provisions of 220 C.M.R. § 1.06(6)(d)(3), any party may appeal this Ruling to the Commission by filing a written appeal with supporting documentation within five (5) days of this Ruling. Any appeal must include a copy of this Ruling.

/s/ September 7, 2006

Carol Pieper, Arbitrator Date